

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>LINDA K. WILLIAMS</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 199,860
<b>GENERAL ELECTRIC COMPANY</b>	)	
Respondent	)	
AND	)	
	)	
<b>ELECTRIC MUTUAL LIABILITY INSURANCE CO.</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent and claimant both appeal from an Award entered by Administrative Law Judge John D. Clark on February 26, 1999. The Board heard oral argument August 25, 1999.

**APPEARANCES**

James R. Roth of Wichita, Kansas, appeared on behalf of claimant. Matthew J. Thiesing of Lenexa, Kansas, appeared on behalf of respondent and its insurance carrier.

**RECORD AND STIPULATIONS**

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

**ISSUES**

This case was originally decided by Administrative Law Judge John D. Clark on April 3, 1997. The initial award granted work disability and used a 100 percent wage loss because claimant was not working. On the appeal from that original decision, the Board determined claimant had not made a good faith effort to find employment after the injury and concluded a post-injury wage should be imputed consistent with *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997). But this case was tried before the *Copeland* decision and the parties had offered no evidence to establish what post-injury wage should be imputed. The Board, therefore, remanded the case to the ALJ to take additional evidence and determine what wage should be imputed.

On the Board's remand to the ALJ, the parties offered evidence of claimant's wage earning ability and the ALJ determined claimant has the ability to earn a wage which is 60.875 percent less than the wage she was earning at the time of the injury. As required by K.S.A. 44-510e, the ALJ averaged this wage loss with the task loss, in this case a 36 percent task loss, and awarded a 48.44 percent work disability. This last award is the subject of the current appeal.

On appeal, respondent now contends claimant should be limited to an award based on functional impairment or, in the alternative, a smaller wage loss should be used for the work disability. Claimant, on the other hand, argues that the burden of proving post-injury wage ability is on the respondent and, according to claimant, respondent has not met that burden. Claimant also asks the Board to reconsider its earlier ruling that the claimant did not make a good faith effort to find employment.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record and considering the arguments, the Board finds that the Award entered on remand should be affirmed.

On remand, the parties introduced additional testimony from the claimant and opinions from Ms. Karen C. Terrill and Mr. James T. Molski relating to claimant's ability to earn a wage. Ms. Terrill opined that claimant, who lived near Oxford, Kansas, could earn \$6.50 per hour and if she included the Wichita area, she could earn \$7 to \$8 per hour. Mr. Molski concluded it would be very difficult for claimant to find employment, but he also gave his opinion she could earn \$5.50 to \$6 per hour. The ALJ averaged the \$6 from Mr. Molski and the \$6.50 from Ms. Terrill.

Respondent first argues that the *Copeland* decision calls for a functional impairment award where claimant has not made any effort to find employment. The Board disagrees with this reading of the Court of Appeals decision. As we construe the *Copeland* decision, the fact finder must, in cases where claimant has not made a good faith effort to find employment, determine an appropriate wage based on claimant's abilities. If that appropriate wage is 90 percent or more of the pre-injury wage, the claimant will be limited to functional impairment pursuant to K.S.A. 44-510e. Otherwise, the imputed wage is used to calculate the appropriate work disability.

Respondent next argues the ALJ should have made some determination regarding claimant's ability to earn fringe benefits to be added to the post-injury wage. But the evidence introduced does not provide a basis for such a finding. Mr. Molski testified it was unlikely that a job paying \$5.50 to \$6 would have fringe benefits. Ms. Terrill opined that claimant should be able to find work which included fringe benefits, but she did not give an opinion as to the dollar value or cost to the employer of those benefits. Under these circumstances, the Board agrees with the decision not to include fringe benefits in the post-injury wage.

Respondent next argues the ALJ erred by not using Ms. Terrill's opinion that claimant might earn as much as \$8 per hour if she worked in Wichita. While the Board agrees it might be reasonable to consider the Wichita area as part of claimant's labor market, the Board agrees with the compromise of the opinions the ALJ used in this case. Considering Mr. Molski's opinion that it is likely to be very difficult for claimant to find any employment, the Board considers the conclusion reached by the ALJ to be a reasonable one. The Board agrees with and affirms that finding.

Finally, claimant argues respondent has not proven claimant's post-injury wage earning ability. The argument appears to rest on Mr. Molski's testimony that claimant will find it very difficult to find employment with her abilities and restrictions. But the Board finds the evidence more than adequately proves claimant has the ability to earn a wage and the evidence more than adequately provides a basis for determining the likely amount of that wage.

Claimant has also asked for reconsideration of the Board's earlier decision that claimant has not made a good faith effort to find employment. Except for the review and modification procedure if circumstances change, there is no procedure for such reconsideration on a second appeal or otherwise. The request to reconsider that issue is denied.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge John D. Clark on February 26, 1999, should be, and the same is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of September 1999.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: James R. Roth, Wichita, KS  
Matthew J. Thiesing, Lenexa, KS  
John D. Clark, Administrative Law Judge

**LINDA K. WILLIAMS**

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**DOCKET NO. 199,860**

Philip S. Harness, Director